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15-35, 15-105, 15-119, 15-191

In the Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, FIFTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE STATES OF TEXAS, OHIO, ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, MICHIGAN, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Executive violates the Religious Freedom Restoration Act ("RFRA") by forcing objecting religious nonprofit organizations to comply with the HHS contraceptive mandate under an alternative regulatory scheme that requires these organizations to act in violation of their sincerely held religious beliefs.

2. Whether the Executive can satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where the Executive itself admits that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to objectors' employees.

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INTEREST OF *AMICI CURIAE*

Amici are the States of Texas, Ohio, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Michigan, Montana, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin. They have an interest in the participation of religious nonprofits as vibrant and vital threads in the social fabric of the States. Religious nonprofits serve their communities in a variety of ways, from caring for the youngest members of society, to serving the elderly with

compassion, to providing educations that allow individuals to pursue their own contributions. It is paramount to the *amici* States that religious nonprofits such as the petitioners here can continue with their contributions. Erecting impediments to their adherence to their religious beliefs can threaten such religious nonprofits' continued work, which is driven and shaped by those beliefs.

The *amici* States also have a substantial interest in ensuring that courts and the federal government respect religious beliefs by refusing to second-guess religious adherents' line-drawing about what conduct is prohibited to them as sinful or immoral. The States' commitment to guarding the dignity of religious convictions is reflected in the States' own laws. Each state constitution protects religious liberty, and some include protections that go beyond rights recognized under the Free Exercise Clause of the First Amendment.[1] And twenty States statutorily protect religious liberty from government intrusion, as does RFRA.[2]

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[1] *See, e.g.*, Ala. Const. art. I, § 3.01; *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (holding that Article I, § 7, of the Ohio Constitution requires strict scrutiny even for a generally applicable, religion-neutral regulation that burdens religious exercise).

[2] Such general laws, often called State RFRAs, have been enacted in Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See* App. 1a (citations).

The *amici* States thus have a substantial interest in protecting religious exercise from governmental intrusion. That interest is even more acute when religious practice is burdened not by congressional enactments, but by federal executive directives that do not pursue their ends in the manner least restrictive of religious liberty. Such executive action skirts the rules laid down in RFRA, a bipartisan congressional enactment about the respect due to religious adherents in our pluralistic society.

SUMMARY OF ARGUMENT

Petitioners are religious nonprofits with sincere religious objections to maintaining an insurance relationship or plan through which coverage for contraceptive drugs is delivered. Executive branch regulations now mandate that petitioners do just that.

Many non-religious employers already receive an exemption from the mandate for purely secular reasons. The Department of Health and Human Services (HHS), the Treasury Department, and the Labor Department (collectively, the Executive) exclude from the contraceptive mandate any employer with a "grandfathered" insurance plan, meaning a plan that has not been materially changed after a cutoff date (which was before the contraceptive mandate was proposed). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014). That limitation is provided as an administrative convenience to employers, and it covers 35% of employers and 25% of all covered employees in the Nation.[3] Employers of fewer

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[3] Kaiser Family Foundation and Health Research & Educational Trust, *2015 Employer Health Benefits Survey* 214-15 (Sept. 22, 2015), http://kaiserf.am/1iKCViK.

than 50 full-time workers also are not subject to the mandate, and those employers collectively employ about 34 million people. *Hobby Lobby*, 134 S. Ct. at 2764.

Petitioners seek a more modest exemption. Their position is based not on the secular burden of administrative inconvenience, but on a sincere religious conviction that complying with the contraceptive mandate is forbidden to them. The Executive already accommodates that religious conviction for other religious groups (churches and their integrated auxiliaries) by providing an exemption from the contraceptive mandate. But the agency refuses to provide that same exemption to religious nonprofits like petitioners. That refusal is based only on the speculation that churches, associations of churches, and their "integrated" auxiliaries are more likely "to employ people of the same faith who share the same objection." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39874 (July 2, 2013).

RFRA entitles petitioners to scrutiny of the Executive's justification for depriving them of the same exemption already afforded to other groups. Petitioners share with churches the same religious conviction about providing health insurance in a way that does not create obligations to provide coverage for contraceptives. The existence and sincerity of that religious conviction is not disputed, and it is a conviction about petitioners' own conduct. The Executive's regulation substantially burdens petitioners' ability to abide by their religious conviction, however, as they are subject to substantial monetary liability for noncompliance. Those conclusions establish that RFRA scrutiny applies.

Several courts, nevertheless, have departed from this Court's instructions in *Hobby Lobby*. Under RFRA's substantial-burden test, courts should judge whether the government coerces a person to act in a way the person sincerely believes violates religious principle and, if so, whether the coercion is substantial. Going beyond that inquiry—attempting to judge the validity or substantiality of a religious conviction about the morality of engaging in certain acts because of their consequences—inserts courts into areas reserved for religious debate. Religious adherents will not all have the same answers on such theological questions. But for courts to rule based on their views on such religious determinations, rather than adherents' views, undermines the respect and tolerance enshrined in RFRA.

A proper approach to the substantial-burden test will vindicate Congress's design. Rather than the Executive side-stepping any scrutiny of how its contraceptive mandate comports with religious liberty, its regulatory means will be measured against other means that would achieve any compelling governmental interest. That balancing reflects traditions of religious tolerance that are foundational to our Nation.

The Executive also has not shown that its mandate to petitioners is the least restrictive means of advancing a compelling interest. *See* 42 U.S.C. § 2000bb-1. The Executive has already determined that its interests can be achieved while still affording the exemption for grandfathered plans and for churches, associations of churches, and integrated auxiliaries. And the Executive has not shown why it cannot use alternatives that deliver no-cost contraceptives without impinging on religious exercise.

ARGUMENT

Many religious nonprofits around the country are driven by their faith to care for their employees by providing them health insurance. But some employers believe it incompatible with their religious convictions to provide that health insurance when it means contracting with a company that then, by virtue of that very relationship, becomes obligated to cover contraceptives regarded as abortifacients. The reasonableness of such line-drawing about an actor's moral complicity in enabling conduct is fundamentally a religious question, not a legal question. *See Hobby Lobby*, 134 S. Ct. at 2778.

Before the contraceptive mandate, any religious employer could abide by the religious belief at issue here by offering health insurance without engaging in an insurance relationship that would obligate coverage for contraceptives. After the contraceptive mandate, however, some employers are unable to abide by that religious belief without violating federal regulations and incurring substantial financial liability. If they provide notice of their objection to contraceptive coverage and continue to engage a company to issue or administer health insurance for their employees, then and only then is that company legally required to cover contraceptives—some of which the religious employers regard as killing human life. *See E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 454 (5th Cir. 2015) (insurer or third party administrator "must provide payments" only where the religious employer maintains the mandated "insured" or "self-insured" plan giving rise to the coverage). The supposed "accommodation" offered by the Executive does not change that fact, because how a hired

company pays for the contraceptives is immaterial to this religious belief. Thus, the mandate will coerce employers to proceed with a course of action despite a belief in its religious impermissibility, because the alternative is not providing health insurance, thereby violating federal requirements while incurring substantial fines.

That dilemma is faced by only some employers with those religious convictions. Recognizing the religious-liberty burden, the Executive has exempted churches (as well their "integrated" auxiliaries and associations of churches) from the contraceptive mandate, thus relieving them of the coercion to violate their religious beliefs. Those employers can still hire an insurance issuer or administrator to provide insurance for their employees without violating their religious convictions. *See Hobby Lobby*, 134 S. Ct. at 2763 (noting exemption); 45 C.F.R. § 147.131 (authorizing exemption). There is no apparent reason why the religious-liberty burden underlying this exemption for churches is not even cognizable under RFRA when felt by religious charities, religious schools, and other nonprofits holding the exact same religious beliefs. The Executive has not articulated a reasonable basis for exempting some organizations but not others that share the same religious objection. Nor has it shown that the mandate's "accommodation" option for compliance is the least restrictive means of advancing a compelling interest.

I. The Executive's Mandate Substantially Burdens Petitioners' Religious Exercise By Forcing Them To Choose Between Violating Their Faith Or Incurring Severe Financial Penalties.

This Court in *Hobby Lobby* addressed the conundrum faced by closely-held-companies with sincere religious objections to providing health insurance that covers contraceptives: "If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day" in penalties. 134 S. Ct. at 2759. "If these consequences do not amount to a substantial burden," the Court held, "it is hard to see what would." *Id.*

Petitioners here face that dilemma. In this iteration, the Executive exempts entire classes of employers from the contraceptive mandate for secular reasons (administrative convenience) as well as some employers on religious grcunds (such as churches and their "integrated" auxiliaries). But the Executive does not exempt other religious groups, like petitioners, which have the same religious objections as many exempt religious entities. Instead, the Executive offers a so-called "accommodation" that requires the religious entity to file a notification of their religious objection with HHS or the insurer. But this notification does not result in an exemption from the mandate to provide the objected-to insurance. Instead, the result of the notification is the provision of contraceptives to the religious organization's employees seamlessly through the employer's group health plan, paid for by the insurer or third-party administrator (TPA).

Petitioners sincerely believe that if they comply with the Executive mandate, including its "accommodation" option for compliance, they will be morally complicit in facilitating or participating in the provision of contraception or abortions in violation of their religious beliefs. If they do not comply, they will be forced to pay onerous financial penalties for adhering to that religious conviction.

The substance and sincerity of petitioners' religious beliefs are not disputed. The severe financial consequences for noncompliance are also beyond question. *E.g.*, 26 U.S.C. § 4980D (imposing a penalty of $100 per day per affected individual); *id.* § 4980H (imposing a penalty of $2,000 per year per full-time employee). That is enough to establish a substantial burden under RFRA. *See Hobby Lobby*, 134 S. Ct. at 2759.

The Executive's contention that there is no substantial burden turns on characterizing the nature of petitioners' religious *objection* as insubstantial. Although the Executive thus views RFRA as requiring cognizance of only religious beliefs that the Executive concludes are substantial, this Court has instructed that "it is not for us to say that [petitioners'] religious beliefs are mistaken or insubstantial." *Id.* at 2779. After *Hobby Lobby*, there is no doubt that the Executive mandate substantially burdens petitioners' religious exercise and triggers RFRA scrutiny.

A. The Improper Substantial-Burden Test Applied By Some Circuit Courts Second-Guesses The Merits Of Religious Beliefs.

1. Religious faith and tolerance played a leading role in the settlement of the colonies and the founding of the

United States. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823-24 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702-04 (2012). This country has a long tradition of governing so as to meaningfully protect the free exercise of religion. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523-24 (1993) (noting "the Nation's essential commitment to religious freedom"). By allowing religious adherents exceptions that are at least equal to other religious and secular exceptions from regulation, our governments respect diverse faiths and govern by adopting policies that avoid unnecessary friction between faith and law.

The Executive, however, resists providing the religious believers here the exemption already accorded to their fellow believers operating under other corporate forms, such as a church or its "integrated" auxiliary. The Executive's insistence on certain organizational religious structures is not informed by, and does not account for, the religious beliefs at issue. Yet the Executive contends that this decision does not substantially burden religious exercise and therefore does not even require scrutiny under RFRA. *See* Br. in Opp. 14, *Priests for Life v. HHS*, Nos. 14-1453 and 14-1505 (Aug. 12, 2015).

Despite this Court's instructions in *Hobby Lobby*, the circuit courts here have accepted the Executive's invitation to assess the validity of a religious conviction. That assessment intrudes upon the dignity of adherents' convictions regarding profound religious concepts such as facilitation and complicity. It subjects those beliefs to judicial review, and it asks courts to determine the substantiality of the reasons of faith animating a believer's

desired exercise of religion—rather than the substantiality of the governmental burden on that religious exercise. That assessment is not the inquiry required by RFRA, a bipartisan enactment reflecting the spirit of religious tolerance that this country holds dear.[4]

2. In determining whether a RFRA substantial burden exists, courts have not been permitted to assess the validity of a religious prohibition of given conduct. That determination is for adherents of the religion. Under RFRA's substantial-burden analysis, courts should instead address (1) whether the religious belief that one must act or refrain from acting in a given way is sincere, and (2) whether the challenged governmental action creates substantial coercion to act contrary to that religious conviction.

As this Court explained in *Hobby Lobby*, federal courts have no business resolving a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral act by another." 134 S. Ct. at 2778. But that is exactly what the courts of appeals did below, in establishing their own views on "complicity," for example. *See, e.g.*, *Geneva Coll. v. Burwell*, 778 F.3d 422, 435 (3d Cir. 2015) ("we must

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[4] The House and Senate approved RFRA in an almost unanimous vote. 139 Cong. Rec. S14461, 14471 (daily ed. Oct. 27, 1993); 139 Cong. Rec. H2356, 2363 (daily ed. May 11, 1993); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210-11 & n.9 (1994) (describing RFRA's bipartisan support).

objectively assess whether the [religious college's] compliance does, in fact, make them complicit in the provision of contraceptive coverage"). It is not for courts to decide whether mandated action, which religious adherents see as making them morally complicit in results that their faith proscribes, is too "attenuated," "independent," or "separate" from the result to establish spiritual wrongdoing. *Compare, e.g., E. Tex. Baptist Univ.*, 793 F.3d at 460 ("payments for contraceptives are completely independent of the plans" that, in combination with "accommodation" notice, give rise to the obligations under the mandate scheme; coverage is provided "separately from the plans" the creation of which ties into the coverage obligation), *with Hobby Lobby*, 134 S. Ct. at 2777-78 (rejecting the argument that "the connection between what the objecting parties must do and the end that they find to be morally wrong is too attenuated"; it is not for courts to say whether the line drawn "was an unreasonable one").

Repeatedly, this Court has refused to question the boundaries, importance, or validity of a person's religious beliefs. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for us to say that [petitioners'] religious beliefs are mistaken or insubstantial."); *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those

creeds."); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (noting that courts lack authority to decide "the interpretation of particular church doctrines and the importance of those doctrines to the religion").

The courts of appeals below, however, effectively second-guessed petitioners' religious objections by finding that coercion to take a particular course of conduct does not pressure petitioners into violating their religious beliefs. *See, e.g.*, *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 939 (8th Cir. 2015) (observing that a number of other courts of appeals "concluded as a matter of law that because the accommodation process does not trigger contraceptive coverage or make the religious objector complicit in the provision of that coverage, the accommodation process cannot impose a substantial burden on the exercise of religion"). Although petitioners' objections rest on *religious* judgments, the circuit courts offered only *legal* distinctions immaterial to that religious view. *See, e.g.*, *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1191 (10th Cir. 2015) (rejecting the religious objection to the "accommodation" on the ground that "the purpose and design of the accommodation scheme is to ensure that Plaintiffs are *not* complicit" in the provision of contraception).

B. The Mandate Substantially Burdens Petitioners' Religious Exercise.

Three basic points should resolve the burden issue:

- The employers undisputedly hold a sincere religious belief that they may not provide, participate in, or facilitate contraceptive coverage. *See, e.g.*, *id.* at 1178.
- The employers are mandated to provide insurance plans that are a prerequisite to petitioners' contractors having to cover the relevant contraceptives. *See, e.g.*, *id.* at 1161 (citing 26 C.F.R. § 54.9815–2713(a)(1)(iv); 29 C.F.R. § 2590.715–2713(a)(1)(iv); and 45 C.F.R. § 147.130(a)(1)(iv)).
- Employers wishing to follow the dictates of their religious convictions by not providing that link face stiff penalties. *See, e.g.*, 26 U.S.C. § 4980D (imposing a penalty of $100 per day per affected individual); *id.* § 4980H (imposing a penalty of $2,000 per year per full-time employee).

That is enough to trigger Congress's requirement in RFRA that such regulatory schemes receive scrutiny to ensure they appropriately account for those sincere religious beliefs. *See* 42 U.S.C. § 2000bb-1 (declaring that the "[g]overnment shall not substantially burden a person's exercise of religion" unless it is the least restrictive means of furthering a compelling governmental interest).

Of course, not all religious believers will conclude that their conduct that causes others to receive payments for contraceptives makes the believers complicit in the

use or consequences of those contraceptives. But petitioners here do hold that sincere religious belief, and it does not rest on any mistake about the legal regime.

II. The Executive Has Not Justified The Substantial Burden On Petitioners' Religious Exercise By Showing That The Mandate Is The Least Restrictive Means To Further A Compelling Interest.

The substantial burden imposed on petitioners' religious exercise can be justified only upon a showing that the Executive's mandate is the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1. The Executive has failed to meet that high standard.

A. The Executive Has Not Shown That The Specific Burden On Petitioners Furthers A Compelling Governmental Interest.

The Executive has claimed compelling interests in "safeguarding public health" and "assuring that women have equal access to health care services" as justifications for imposing a contraceptive mandate that does not exempt religious nonprofits like petitioners. *See* 78 Fed. Reg. at 39887. RFRA, however, requires more than identification of these broadly formulated interests. The Executive must demonstrate a compelling interest in enforcing the contraceptive mandate against religious nonprofit employers like petitioners specifically. *Hobby Lobby*, 134 S. Ct. at 2779. The Executive did not do so when crafting the mandate, and any attempt to do so now would be futile, as "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citation omitted).

"It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.*

1. The Executive's exemption of tens of millions of employers and employees from the contraceptive mandate purely for administrative-convenience reasons belies the assertion of a compelling interest in not exempting petitioners from the mandate. Today, one out of every four workers is in a "grandfathered" health plan that is exempt from the mandate, and over one-third of employers offer health plans that are exempt from the mandate. *Kaiser Survey*, *supra* note 3. Additionally, small employers (those with fewer than 50 full-time workers) account for 96% of all firms,[5] and they also are not subject to the mandate. 26 U.S.C. § 4980H(c)(2); *see also Hobby Lobby*, 134 S. Ct. at 2764.

The Executive cannot credibly argue that it is advancing a compelling interest by not exempting petitioners "'when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Lukumi*, 508 U.S. at 547 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment)); *cf. Hobby Lobby*, 134 S. Ct. at 2780 (observing that the contraceptive mandate's exemptions are problematic for the assertion of a compelling governmental interest). The fact that the Executive does not

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[5] Executive Office of the President, Counsel of Economic Advisors, *The Economic Effects of Health Care Reform on Small Businesses and Their Employees* 1 (July 25, 2009), http://1.usa.gov/1ZMxuji.

find a compelling interest in using this insurance mandate to provide no-cost contraceptives to tens of millions of women under a grandfathered or exempt health plan raises serious doubt that the interests the Executive asserts for the contraceptive mandate are compelling.

2. The Executive's exemption from the contraceptive mandate of other religious employers with identical religious objections further erodes its assertion of a compelling governmental interest in applying the mandate to petitioners. The Executive's only reason for exempting some religious employers (such as churches and their "integrated" auxiliaries) but not others (including petitioners) is based on unfounded conjecture: that the former "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874.

Such bare speculation shows no "marginal interest in enforcing the contraceptive mandate" against petitioners while not against exempt religious employers with the same objection. *Hobby Lobby*, 134 S. Ct. at 2779. Indeed, "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Id.* at 2786 (Kennedy, J., concurring).

3. Further weakening any asserted compelling interest is the futility of requiring employers like the Little Sisters of the Poor and the hundreds of employers in

their class action with self-insured church plans to comply with the "accommodation." Third-party administrators of the self-insured church plans at issue in these cases are not obliged to cover contraceptives. *See Little Sisters of the Poor*, 794 F.3d at 1188. Consequently, the Executive can force petitioners with self-insured church plans to comply with the "accommodation," "but it has no enforcement authority to compel or penalize those [petitioners'] TPAs if they decline to provide or arrange for contraceptive coverage." *Id.* The Executive cannot possibly justify the substantial burden it imposes on those employers' religious beliefs when it claims—at least for now—that it cannot even accomplish the ends that purportedly justify that substantial burden.

B. The Mandate's "Accommodation" Is Not The Least Restrictive Means Of Providing No-Cost Contraceptives To Petitioners' Employees.

1. The Executive also has not demonstrated that its mandate is the least restrictive means of providing no-cost contraceptives to petitioners' employees. "The least-restrictive-means standard is exceptionally demanding" and requires the Executive to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases." *Hobby Lobby*, 134 S. Ct. at 2780.

There are many less-restrictive alternatives for providing contraceptives to petitioners' employees. This Court flagged the most obvious alternative in *Hobby Lobby*:

> The most straightforward way of doing this would be for the Government to assume the cost of

> providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, *see* § 2000bb–1(b)(2), that this is not a viable alternative.

Id. Circuit courts have also identified other means. *See, e.g.*, *Sharpe Holdings*, 801 F.3d at 945 (listing potential alternatives including that "the government could provide subsidies, reimbursements, tax credits, or tax deductions to employees, or that the government could pay for the distribution of contraceptives at community health centers, public clinics, and hospitals with income-based support"); *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) (noting the "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors," including "a 'public option' for contraception insurance," "tax incentives to contraception suppliers to provide these medications and services at no cost to consumers," and "tax incentives to consumers of contraception and sterilization services"); *Priests for Life v. HHS*, 808 F.3d 1, 13 (D.C. Cir. 2015) (per curiam) (Brown, J., dissenting) (observing that "[t]he government could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage," which would entail providing no-cost contraceptives on health care exchanges).

States too have created no-cost contraceptive programs that do not force anyone to violate their religious convictions. The Texas Women's Health Program

(TWHP), for example, is an entirely state-funded and administered program that provides no-cost contraceptives and other reproductive health care to low-income women in Texas.[6] TWHP provides fee-for-service coverage, TWHP Rep., *supra* note 6 at 2, and over 80% of providers are physicians (as opposed to family planning facilities), *id.* at 5, tbl. 4. Importantly, the program is entirely voluntary; no one is required to provide contraception in violation of their religious beliefs.

Colorado's Family Planning Initiative is another example of a state-run program for providing no- or reduced-cost contraception that has proven highly efficient without coercing anyone to violate their religious beliefs.[7] Funded by a private donor and administered by the State, this voluntary program has contributed to a sharp decline in the teenage birth rate and produced substantial savings in avoiding Medicaid costs.[8]

2. The Executive asserted that there are no less-restrictive alternatives based on its conclusion that other options are "not feasible" because they would require changes to other programs, would require congressional action, "and/or would not advance the government's compelling interests as effectively" as the contraceptive

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[6] *See* Tex. Health & Human Servs. Comm'n, *Texas Women's Health Program: Savings and Performance Reporting* (Jan. 2015), http://bit.ly/1MxvjGW.

[7] *See* Sabrina Tavernise, *Colorado's Effort Against Teenage Pregnancies Is a Startling Success*, N.Y. Times, July 5, 2015, http://nyti.ms/1LO4fap.

[8] Colo. Dept. of Public Health & Env't, *Preventing Unintended Pregnancies is a Smart Investment*, http://1.usa.gov/1Cl61xO.

mandate it crafted. 78 Fed. Reg. at 39888. Although the Executive's stated concern with not overstepping the bounds of its authority is commendable, its response fundamentally misunderstands the least-restrictive-means test by prioritizing effectiveness over religious-exercise burden reduction. "When a plausible, less restrictive alternative" is available, the government must "prove that the alternative will be *ineffective* to achieve its goals." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (emphasis added). RFRA requires that the Executive's choice be the "least restrictive" means for achieving a compelling governmental interest. 42 U.S.C. § 2000bb-1(b)(2).

Hobby Lobby made clear that alternatives need not be cost-free for the government. *See* 134 S. Ct. at 2781 (recognizing that RFRA "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs"). As the Court explained, "HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Id.* Indeed, "nothing in RFRA" supports the argument that "RFRA cannot be used to require creation of entirely new programs." *Id.*

The Executive has other less-restrictive alternatives for achieving its stated policy goal. It has not shown, therefore, that requiring petitioners to violate their religious convictions is the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

III. Religious Nonprofits Are A Vital Thread In States' Social Fabric And Should Be Given Latitude To Operate In Accordance With Their Animating Religious Beliefs.

The Executive's refusal to equally exclude all religious objectors from the contraceptive mandate betrays a lack of proper concern for federal law that protects religious liberty. All persons in our Nation have a right to believe in a divine creator and divine law. "For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

The host of religious objectors to the contraceptive mandate include theological seminaries, schools and colleges, orders of nuns, and charities caring for indigent elderly and orphans. They have avowedly religious missions, and their missions are part of what drives them to operate with a motive, not to profit, but to contribute to societies across the Nation in their own unique ways. The heavy burden that the Executive's mandate imposes if these actors wish to conform their conduct to their sincere religious beliefs may well detract from the vigor with which they are able to serve their communities. RFRA requires the Executive to take account of the important interests of these vital institutions, and doing so requires an exemption to that already afforded to similar religious objectors and even to non-religious employers for secular reasons.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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APPENDIX

"State RFRA" Provisions:

- Arizona: Ariz. Rev. Stat. § 41-1493.01
- Arkansas: Ark. Code § 16-123-401 et seq.
- Connecticut: Conn. Gen. Stat. § 52-571b
- Florida: Fla. Stat. § 761.01 et seq.
- Idaho: Idaho Code § 73-402
- Illinois: 775 Ill. Comp. Stat. § 35/1 et seq.
- Indiana: Ind. Code § 34-13-9 et seq.
- Kansas: Kan. Stat. § 60-5301 et seq.
- Kentucky: Ky. Rev. Stat. § 446.350
- Louisiana: La. Rev. Stat. § 13:5231 et seq.
- Mississippi: Miss. Code § 11-61-1
- Missouri: Mo. Rev. Stat. § 1.302
- New Mexico: N.M. Stat. § 28-22-1 et seq.
- Oklahoma: Okla. Stat. tit. 51, § 251 et seq.
- Pennsylvania: 71 Pa. Stat. § 2403
- Rhode Island: R.I. Gen. Laws § 42-80.1-1 et seq.
- South Carolina: S.C. Code § 1-32-10 et seq.
- Tennessee: Tenn. Code § 4-1-407
- Texas: Tex. Civ. Prac. & Rem. Code § 110.001 et seq.
- Virginia: Va. Code § 57-1 et seq.